UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTIN FLEISHER, AS TRUSTEE OF THE MICHAEL MOSS IRREVOCABLE LIFE INSURANCE TRUST II and JONATHAN BERCK, AS TRUSTEE OF THE JOHN L. LOEB, JR. INSURANCE TRUST, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

PHOENIX LIFE INSURANCE COMPANY,

Defendant.

Civil Action No. 11-cv-8405(CM)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF FACTS 5

A. The Life Insurance Policies at Issue 5

B. Phoenix's Rate Increases 7

1. *The First COI Increase* 7

2. *The Second COI Increase* 9

III. ARGUMENT 10

A. Class Action Standards 10

B. The Proposed Classes Satisfy the Requirements of Rule 23(a) 11

1. *Numerosity.* 11

2. *Commonality.* 11

3. *Typicality.* 16

4. *Adequacy of Representation.* 16

C. The Proposed Classes Satisfy the Requirements of Rule 23(b)(3) 18

1. *Predominance.* 18

2. *Superiority.* 22

IV. CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Allapattah Servs., Inc. v. Exxon Corp.,
333 F.3d 1248 (11th Cir. 2003) 20

Amchem Prods. Inc. v. Windsor,
521 U.S. 591 (1997) 22, 23

Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,
222 F.3d 52 (2d Cir. 2000) 17

Board Of Trustees of the AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.
269 F.R.D. 340 (S.D.N.Y. 2010) 20

Brown v. Kelly,
609 F.3d 467 (2d Cir. 2010) 18

Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.,
502 F.3d 91 (2d Cir. 2007) 18

Dornberger v. Metropolitan Life Ins. Co.,
961 F.Supp. 506 (S.D.N.Y. 1997) 15

Dupler v. Costco Wholesale Corp.,
249 F.R.D. 29 (E.D.N.Y. 2008) 18

Espinoza v. 953 Associates LLC,
280 F.R.D. 113 (S.D.N.Y. 2011) 10

Flores v. Anjost Corp.,
284 F.R.D. 112 (S.D.N.Y. 2012) 10, 19

Freeman Invs., L.P. v. Pac. Life Ins. Co.,
---F.3d---, 2013 WL 11884 (9th Cir. Jan. 2, 2013) 13

In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig.,
270 F.R.D. 521 (N.D. Cal. 2010) 5, 13, 15, 21

In re Conseco Life Insurance Co. Cost of Ins. Litig.,
No. ML 04-1610, 2005 WL 5678842 (C.D. Cal. Apr. 26, 2005) 5, 13

In re Flag Telecom Holdings, Ltd. Securities Litigation,
574 F.3d 29 (2d Cir. 2009) 17

In re Initial Pub. Offering Sec. Litig. ("In re IPO"),
471 F.3d 24 (2d Cir. 2006) 10

In re Marsh & McLennan Cos., Inc. Securities Litig., No. 04 CV 8144, 2009 WL 5178456, at *12 (S.D.N.Y. Dec. 23, 2009) 24

In re Risk Mgmt. Alternatives, Inc., Fair Debt Collection Practices Litig., 208 F.R.D. 493 (S.D.N.Y. 2002) 11, 20

In re Visa Check/MasterMoney Antitrust Litigation, 280 F. 3d 124 (2d Cir. 2001) 20

Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167 (S.D.N.Y. 2011) 11

Jermyn v. Best Buy, 256 F.R.D. 418 (S.D.N.Y. 2009) 16, 24

MacNamara v. City of New York, 275 F.R.D. 125 (S.D.N.Y. 2011) 10

Madanat v. First Data Corp., 282 F.R.D. 304 (E.D.N.Y. 2012) 12, 14, 16

Marisol A. By Forbes v. Giuliani, 126 F. 3d 372 (2d Cir. 1997) 12

Mazzei v. Money Store, --- F. Supp. 2d ---, 2012 WL 6622706 (S.D.N.Y. Dec. 20, 2012) 12

Moore v. PaineWebber, Inc., 306 F. 3d 1247 21

Myers v. Hertz Corp., 624 F.3d 537 (2d Cir. 2010) 11

Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co., 277 F.R.D. 97 (S.D.N.Y. 2011) 18, 24

Robidoux v. Celani, 987 F.2d 931 (2d Cir. 1993) 16

Romero v. H.B. Auto. Group, Inc., 11 Civ. 386 CM, 2012 WL 1514810 (S.D.N.Y. May 1, 2012) 11

Seekamp v. It's Huge, Inc., No. 1:09-CV-00018, 2012 WL 860364 (N.D.N.Y. Mar. 13, 2012) 18

Seijas v. Republic of Arg., 606 F.3d 53 (2d Cir. 2010) 22

Smilow v. Southwestern Bell Mobile Systems, Inc.,
323 F.3d 32 (1st Cir. 2003) 18

Steinberg v. Nationwide Mut. Ins. Co.,
224 F.R.D. 67 (E.D.N.Y. 2004) 4, 12, 15, 19

Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.,
262 F.3d 134 (2d Cir. 2001) 10

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 10, 12

Statutes

N.Y. Ins. Law § 3201(b)(1) 6

N.Y. Ins. Law § 4224(a) 8, 15

Other Authorities

2 Newberg on Class Actions,
§ 4.29 (4th ed. 2010) 23

Rules

Fed. R. Civ. P. 23 10

Fed. R. Civ. P. 23(a) 3, 10, 18

Fed. R. Civ. P. 23(a)(1) 3

Fed. R. Civ. P. 23(a)(2) 3, 11

Fed. R. Civ. P. 23(a)(3) 3

Fed. R. Civ. P. 23(a)(4) 3

Fed. R. Civ. P. 23(b) 10

Fed. R. Civ. P. 23(b)(3) .... passim

I. INTRODUCTION

On two separate occasions in 2010 and 2011, defendant Phoenix Life Insurance Company ("Phoenix") raised the cost of insurance ("COI") applicable to hundreds of life insurance policies in one fell swoop. The New York state agency responsible for supervising and regulating all insurance carriers in New York ruled that Phoenix's first COI rate hike was illegal. In its words: [redacted] yet that is exactly what Phoenix did when it first raised the COI. Ex. J (NYSID Order, Sept. 6, 2011).[1] As explained below, plaintiffs allege in this case that the second rate hike was also illegal.

Plaintiffs own Phoenix-issued life insurance policies affected by these unlawful COI increases, and bring this class action on behalf of themselves and all other policy owners who have been victimized by Phoenix's illegal across-the-board rate hikes. *See* Compl. ¶¶ 36-37 (defining classes). Evidence common to all Class members will be offered to demonstrate that the COI increases violated the plain language of the standardized, form insurance policies held by all Class members. The evidence will also show that Phoenix identified two groups of policyholders and increased the COI on those holders as a group, not individually. In fact, when trying unsuccessfully to defend one of the two COI hikes at issue in this case to New York's insurance regulators, Phoenix admitted [redacted] Ex. G (2/8/2011 Letter to NYSID).

There is no meaningful difference in the relevant terms of any of the policies at issue, which are all substantively identical to the policies held by the plaintiffs. All of the policies state

[1] Unless otherwise noted, a true and correct copy of all exhibits cited in this memorandum are attached to the Declaration of Steven G. Sklaver, dated January 11, 2013 ("Sklaver Decl."). The "NYSID" is the New York State Insurance Department which was the New York state agency formerly responsible for supervising and regulating all insurance business in New York. The agency was later consolidated with another agency and renamed the New York Department of Financial Services.

that any change in the COI rates will be (i) based only on expectations of future mortality, persistency, investment earnings, expense experience, capital and reserve requirements (collectively, the "Non-Guaranteed Elements"),[2] and (ii) made on a uniform basis for all insureds in the same class. At trial, plaintiffs will present evidence common to each Class member that Phoenix breached these contractual provisions.

Phoenix's decision to raise the COI on a group of life insurance policies, which Phoenix treated as "blocks" for purposes of monitoring their financial performance, was not based on any individualized, policy-specific factors. Phoenix conducted "experience studies" to monitor actual experience compared to original pricing assumptions applicable to these blocks. Common evidence will be offered to show that the actual experience of the Non-Guaranteed Elements for the group of policies at issue in this case did not deviate significantly from original pricing for the same group. And even if Phoenix contends that these experience studies justified a COI increase, that will present an issue common to the Class because such a showing will be relevant to plaintiffs' claims that Phoenix only initiated a COI increase for a specific sub-set of those policies, thereby violating the anti-discrimination provisions that each insurance policy contains.

Discovery has also revealed that Phoenix made false statements to the NYSID in response to the NYSID's investigation of Phoenix's COI hikes, which were applicable to the Class as a whole. Phoenix at one point told regulators that its COI increase [redacted] Ex. G (2/8/2011 Letter from Phoenix to NYSID, at PLIC 000940). Phoenix did so even though [redacted] Ex. I (Voicemail from Phoenix VP Byron Frank).

As the foregoing demonstrates, plaintiffs' case will rise or fall on common proof, that is, on facts common to the members of the proposed Classes. Given the nature of plaintiffs' claim

[2] For policies subjected to the second COI increase, "tax assumptions" is also a permitted ground for Phoenix to raise COI.

for breach of contract and the evidence that will be adduced to prove it, and because all required elements of Fed. R. Civ. P. 23(a) and (b)(3) are satisfied, the Court should certify the proposed Classes.[3]

Rule 23(a)(1) numerosity is present because the proposed Class is comprised of well over one-hundred policy owners, thereby making joinder of them all impracticable. There are common questions of law and fact arising from Phoenix's uniform COI increases, thus satisfying Rule 23(a)(2)'s commonality requirement. Any questions about the justification for the COI increase and the resultant impact on the Classes, are common to all plaintiffs and members of the Classes.

Rule 23(a)(3)'s typicality requirement is also satisfied. Plaintiffs' claims are typical of the claims of all Class members because each plaintiff and member of the Classes was subjected to Phoenix's COI increase. Plaintiffs assert the same claims for breach of contract arising out of the same alleged illegal common course of conduct. Rule 23(a)(4)'s adequacy of representation requirement is fulfilled because plaintiffs do not have any interests that conflict with the Classes they seek to represent, and plaintiffs are represented by well-qualified counsel who are diligently prosecuting the claims on behalf of both Classes. The interests of plaintiffs and Class members are co-extensive given that each plaintiff, like each Class member, has an interest in proving Phoenix's liability and obtaining redress.

Rule 23(b)(3) certification is warranted, given that common issues of law and fact predominate over questions affecting individual Class members, and that class treatment is superior to other methods of adjudicating the matter. Common issues predominate because the salient legal and factual questions in this case will be resolved with proof common to all plaintiffs and Class members. Plaintiffs will prove their case with common evidence that all

---

[3] The operative Complaint originally had alleged four claims for relief: breach of contract, breach of implied covenant of good faith and fair dealing, violation of General Business Law § 349, and declaratory judgment. On May 2, 2012, the Court granted Defendant's motion for partial dismissal of the complaint and dismissed all claims except for the breach of contract claim.

Class members were subjected to Phoenix's COI increases; that the relevant contract terms for each life insurance policy are nearly identical for all Class members; and that the COI increase resulted in a breach of contract that Phoenix has not remedied. Common issues thus predominate.

Turning to the superiority prong of Rule 23(b)(3), nearly all Class members have claims that are too small to incur the expense of litigation on an individual basis, and, indeed, the courthouse doors will be effectively closed to almost all of these consumers unless a class is certified. As the Court has witnessed, Phoenix has spent over a million dollars and spared no expense in defending this case, leaving no stone unturned and fighting every issue, no matter how inconsequential. *See, e.g.* December 27, 2012 Order (Dkt. 72) (rejecting Phoenix's attempt to delay document production for 17 months and request to make plaintiffs pay for this discovery); *see also* January 3, 2013 Order (Dkt. 77) (rejecting Phoenix's attempt to prevent plaintiffs from obtaining access to documents created by its actuarial consultant on meritless privilege grounds).[4] No Class member can prove this case without the pooling of resources offered by the class action mechanism. Further, adjudicating claims in a single proceeding before this Court, which is already intimately familiar with the subject matter of this case, is much more efficient than a multiplicity of suits here and elsewhere that would unduly burden the judicial system. A class action is a superior method of adjudicating plaintiffs' claims.

It is well-known that "[c]laims arising from interpretations of a form contract appear to present the classic case for treatment as a class action." *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 74 (E.D.N.Y. 2004) (quotations omitted). Courts, in fact, have certified class actions in cases very close to the facts here—a breach of contract COI dispute against an insurance company. *See In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig.*, 270

[4] *See also* Dkt. 55 (Declaration of Jason H. Gould In Support of Phoenix's Opposition to Plaintiffs' Motion to Compel) ¶ 9 (admitting that Phoenix has paid third-party discovery vendors $734,000 to date, a figure which "does not include the additional hundreds of thousands of dollars Phoenix has paid its litigation counsel.")

F.R.D. 521, 529-30 (N.D. Cal. 2010) ("*Conseco II*") (holding commonality satisfied because "interpretation of the standard written policy language will present a question common to the class"); *In re Conseco Life Insurance Co. Cost of Ins. Litig.*, No. ML 04-1610, 2005 WL 5678842, at *4 (C.D. Cal. Apr. 26, 2005) ("*Conseco I*") (holding commonality satisfied because "whether the [defendant's action] constituted a breach of contract is an issue common to all class members"). For the same reasons, Plaintiffs' motion for class certification should be granted.

II. STATEMENT OF FACTS

A. The Life Insurance Policies at Issue

This is a class action brought on behalf of hundreds of policyholders who own flexible-premium universal life insurance policies issued by Phoenix, known as "Phoenix Accumulator Universal Life," or "PAUL" policies. Phoenix's Answer, ¶2. The principal benefit of PAUL policies is that they permit policyholders to pay a flexible premium instead of a specific amount every time. *See* Phoenix's Answer, ¶19; Ex. G (PAUL Marketing Material, at PLIC 000965). Unlike whole life insurance, which requires fixed monthly or quarterly premium payments, the only premium required for PAUL policies is the minimum amount necessary to keep the policy in force, which is usually set at the amount sufficient to cover the COI charges and certain other specified expense charge. Any payment more than the minimum is contributed to the "accumulated policy value" or "cash value" and is added to the policy's accumulated value either to be paid out upon maturity or used to pay future premiums. Phoenix's Answer, ¶19. Consumers often prefer flexible-premium universal life policies because they present the opportunity to pay lower premiums, as well as [redacted] Ex. G (PAUL Marketing Material, at PLIC 000965). When consumers fully utilize this flexible premium feature, the "accumulated policy value"—which reflects the amount of premiums paid in excess of COI charges and expenses—is close to zero.

The policies at issue are all form policies issued by Phoenix from 2004 to 2008 under either "Form U607 NY" or "Form 05PAUL NY." *See* Ex. J (Sept. 6, 2011, NYSID Order) [redacted] Ex. M (Oct. 21, 2011 Letter from Phoenix to NYSID) [redacted]. Insureds are not permitted to negotiate any terms, and each policy form must be approved by the NYSID in a standard format before it can be lawfully sold within the state. Declaration of Larry N. Stern ("Stern Decl."), ¶17; N.Y. Ins. Law § 3201(b)(1). These standard policies explain the factors that Phoenix may consider in setting initial COI rates and also contain various prohibitions and limitations on how and why Phoenix may increase COI rates. *See* Declaration of Jonathan Berck ("Berck Decl."), Ex. A (Loeb Policy); Declaration of Martin Fleisher ("Fleisher Decl."), Ex. A (Moss Policy). For example, the Loeb Policy, which was a Form U607 NY policy, states that [redacted] Loeb Policy at 11. Similarly, the Moss Policy, which was a Form 05PAUL NY policy, states that [redacted] Moss Policy at 12.

The COI terms in the Moss and Loeb policies are standard terms of Phoenix's Form U607 NY and Form Paul NY policies that are substantively identical across all the policies at issues in this case. *Compare* Fleisher Decl., Ex. A (Moss Policy) *with* Sklaver Decl., Ex. D (Specimen 05PAUL NY Policy).[5]

[5] Phoenix does not dispute the fact that all of the policies affected by the COI increases at issue in this case are similarly worded. In fact, because of this similarity, during discovery, Phoenix only produced "copies of *specimen* policy forms for New York policies subject to the first COI rate increase." Ex. B (Phoenix's Responses and Objections to Plaintiff's First Set of Document Requests) (emphasis added).

B. Phoenix's Rate Increases

Despite selling "flexible premium" PAUL policies, beginning in 2010, Phoenix initiated a series of COI rate increases targeted at policyholders who chose to use the flexible premium feature and paid only the minimum premium required. Phoenix internally called this COI rate increase [redacted] Exs. K, N.

1. *The First COI Increase*

In March 2010, Phoenix announced the first COI rate increase, which would affect 700 PAUL policyholders nationwide, including the Loeb Policy. These policies were selected because, in Phoenix's opinion, [redacted] *See* Berck Decl., Ex. B (First COI Letter); Sklaver Decl., Ex. F (Sample First COI Letter, at PLIC 000732). For other policyholders of the same class, no COI rate increase was imposed because [redacted] Ex. F (Sample First COI Letter, at PLIC 000731). In applying these disparate rate increases, Phoenix treated members of the class differently notwithstanding its contractual obligation to make [redacted] and made COI rate hikes based on funding levels notwithstanding that funding levels were not a contractually permissible ground to increase the rates. Loeb Policy at 11. Indeed, Phoenix told policyholders subjected to this unlawful increase that [redacted] Berck Decl., Ex. B.

The intent and effect of the COI rate increase announcement was to stop policyholders from fully utilizing the flexible premium feature of the PAUL policies and to induce the lapse of these policies. Exs. O, P [redacted] Phoenix's discriminatory rate hike prompted an investigation by the NYSID, the state agency charged with regulating insurers. Ex. E (Letter from NYSID). In addition to contradicting the standard terms of these policies, Phoenix's COI increase violated New York law, which prohibits a life insurance company from making "any unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for policies of life insurance or annuity contracts." N.Y. Ins. Law § 4224(a).

In response to inquiries from the NYSID, Phoenix stated [redacted] Ex. G (2/8/2011 Letter from Phoenix to NYSID, at PLIC 000946). At no point did Phoenix suggest that its decision relied on an analysis of individual policies nor that the NYSID needed to make any individualized determinations about the terms of the policies in order to evaluate whether the increase was lawful. In fact, during the investigation, Phoenix relied on generalized policy illustrations to demonstrate the permissibility of the first COI increase, *see id.* at PLIC 000968-977, PLIC 000985-994, and throughout its response letter Phoenix repeatedly referenced [redacted] *id.* at PLIC 000951.

Phoenix then tried to backpedal from its previous concessions that [redacted] Ex. H (6/24/2010 Letter from Phoenix to NYSID). Perhaps realizing that this was an admission that the new COI rates were in violation of the plain terms of the policies, [redacted] Phoenix later tried [redacted] Ex. G (2/8/2011 Letter from Phoenix to NYSID, at PLIC 000940). But in that same letter to the NYSID, Phoenix admitted [redacted] *Id.* at PLIC 000945 (emphasis added). This is consistent with Phoenix's original position, best expressed in a voicemail with a reinsurer [redacted] Ex. I (Voicemail from Phoenix VP Byron Frank).

Ultimately, the NYSID saw through Phoenix's misconduct and ruled that the COI increase [redacted] Ex. J (NYSID Order, Sept. 6, 2011) (emphasis added). The NYSID explicitly rejected Phoenix's attempt [redacted] *Id.* Put simply, the policy form under review, which does not materially differ from those possessed by every putative Class member, [redacted] *Id.*

Subsequent to the filing of this action, Phoenix announced that it "rescinded" the unlawful first COI increase. Ex. Q (Sample Letter to Policyholders). But Phoenix has not adequately compensated the affected policyholders for the damages they suffered while the increase was in effect.

2. *The Second COI Increase*

In October 2011, Phoenix announced a second COI increase that affected a different group of roughly 1400 PAUL policies nationwide, including the Moss Policy. Ex. F (Sample 2nd COI Letter); Fleisher Decl., Ex. B. The intent and effect of the second COI increase were the same as with respect to the first COI increase: to penalize policyholders who utilized the flexible premium feature of their policies and to induce lapses of their policies. But, this time, Phoenix tried to avoid the same mistake it made with the first COI increase and made no mention of the fact that the increase was related to the amount of the policyholder's accumulated policy value. *Id.* Instead, Phoenix has not provided any actuarial explanation for applying this increase to a subset of policyholders, which also unfairly discriminates without any apparent basis in expectations of future mortality or other risk factors.

The first and second COI increases each took effect on the policy anniversary of each individual policy. Fleisher Decl., Ex. B; Berck Decl., Ex. B. Because the second COI increase [redacted] for each policy in the putative class starting [redacted] the second COI increase did not take effect for some class members until the end of October 2012. Fleisher Decl., Ex. B. Phoenix has not rescinded the second COI increase.

III. ARGUMENT

A. Class Action Standards

This Court recently confirmed that "[t]he Second Circuit has emphasized that Rule 23 should be given liberal rather than restrictive construction, and it seems beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification." *Flores v. Anjost Corp.*, 284 F.R.D. 112, 122 (S.D.N.Y. 2012) (McMahon, J.) (quoting *Espinoza v. 953 Associates LLC*, 280 F.R.D. 113, 124 (S.D.N.Y. 2011)). Class certification is appropriate when the party seeking certification demonstrates that the four requirements of Rule 23(a) are satisfied, and that a class action may be maintained under one of the three subsections of Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *In re Initial Pub. Offering Sec. Litig.* ("In re IPO"), 471 F.3d 24, 41 (2d Cir. 2006). "[T]he district court is afforded broad discretion in class certification questions due to the fact that 'the district court is often in the best position to assess the propriety of the class [action] and has the ability . . . to alter or modify the class, create subclasses, and decertify the class whenever warranted." *MacNamara v. City of New York*, 275 F.R.D. 125, 137 (S.D.N.Y. 2011) (quoting *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001) (alterations in original)). Although plaintiffs must offer facts sufficient to satisfy the Rule 23 requirements, the court "should not assess any aspect of the merits unrelated to a Rule 23 requirement." *Id.* "[T]he Court's task at the Rule 23 stage is not to resolve the liability question, but to decide 'whether the constituent issues that bear on [Defendant's] ultimate liability are *provable in common*." *Romero v. H.B.*

Auto. Group, Inc., 11 Civ. 386 CM, 2012 WL 1514810, at *17 (S.D.N.Y. May 1, 2012) (McMahon, J.) (emphasis in original, quoting *Myers v. Hertz Corp.*, 624 F.3d 537, 549 (2d Cir. 2010)).

B. The Proposed Classes Satisfy the Requirements of Rule 23(a)

1. Numerosity.

The numerosity requirement is easily met in this case and has already been held satisfied by this Court. At the scheduling conference on December 14, 2012, the Court held: "I'm making a ruling, and I don't believe I would not credit for one second that there were fewer than 40 people in this class, honestly. I'm telling you, if there were, the company would be out of business. . . . Numerosity is out of the case. Ex. T, Hearing Transcript, Dec. 14, 2012 ("Hr'g Tr."), at 17-18.[6]

2. Commonality.

When, as here, a group of plaintiffs suffer under a uniform course of conduct or policy, the commonality test is easily satisfied. *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167, 172–73 (S.D.N.Y. 2011) (McMahon, J.); *In re Risk Mgmt. Alternatives, Inc., Fair Debt Collection Practices Litig.*, 208 F.R.D. 493, 505 (S.D.N.Y. 2002) (McMahon, J.). The central issue in this case—whether the COI increases were contractually permitted—is common to all class members. Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This is satisfied if the putative class's claims all "depend upon a common contention . . . [the] truth or falsity [of which] will resolve an issue that is central to the

[6] The evidence unquestionably supports this ruling. Phoenix told the NYSID that [redacted] Ex. R (Email to NYSID, at PLIC 0545275) and admitted here that there are a total of 232 life insurance policies owned by 132 putative class members at issue in this case. Ex. S (Phoenix's January 8, 2013 email) and Ex. C (Phoenix's Answer to Interrogatory No. 4, identifying different owners for 232 policies).

validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551; *see also Marisol A. By Forbes v. Giuliani*, 126 F. 3d 372, 377 (2d Cir. 1997) (affirming finding of commonality where all class members' "injuries derive from a unitary course of conduct" by defendant). The commonality requirement does not require that all class members' claims or circumstances are identical, "so long as class members share a single question of law or fact in common." *Madanat v. First Data Corp.*, 282 F.R.D. 304, 310 (E.D.N.Y. 2012) (granting partial class certification over breach of contract claims stemming from form contracts with universal boilerplate language).

Breach of contract cases are particularly appropriate for class certification. In a case also involving a breach of contract claim over standard insurance policies, the Eastern District of New York held that commonality was satisfied because the plaintiff had "demonstrated that (1) all putative class members have signed substantively identical or similar [insurance] form agreements with [the defendant]; and (2) [defendant's] practice of taking [certain] deductions [from reimbursements] under the contracts is a common course of conduct that has affected all putative class members." *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 74 (E.D.N.Y. 2004); *see also Mazzei v. Money Store*, --- F. Supp. 2d ---, 2012 WL 6622706, at *15 (S.D.N.Y. Dec. 20, 2012) (granting partial class certification on breach of contract claim where central issue was whether the defendant's acts were lawful under the terms of a form loan agreement).

A similar COI dispute against a different insurance company that also implemented rate hikes has been certified as a class action *twice* by two separate California district courts, both times because the primary contention—whether the insurer's centralized action violated the terms of the policy form—was an issue common to the class. *See Conseco II,* 270 F.R.D. at 529-30; *Conseco I,* No. ML 04-1610, 2005 WL 5678842, at *4.[7]

The proposed classes in this case share common questions of both fact and law. The central issue in this case is whether Phoenix's COI increases violated the terms of the insurance policies at issue either because (1) the basis for the increase was unsupported by an enumerated factor in the contract or (2) because the increase was applied discriminatorily rather than, as the contract requires, to all insureds in the same class. All of the putative class members' claims depend on the outcome of those contested issues and the answers will be uniform for each class member.

Plaintiffs' liability expert on class certification is Larry N. Stern, a Fellow of the Society of Actuaries (FSA) and a Member of the American Academy of Actuaries (MAAA), who has worked in the insurance industry for over forty years in various positions including Senior Vice President, Chief Actuary, as practice leader for product development of life insurance and annuity products at a global consulting firm, and who has designed, developed, and priced many universal life products for life insurance companies, and drafted many universal life policy forms incorporating COI change provisions like the kind at issue in this lawsuit. Mr. Stern explains that Phoenix's actions are particularly well suited for litigation as a class "because the propriety of each COI increase will turn on questions common to the entire subset of affected policies and will not change on a policy-by-policy basis." Stern Decl., ¶ 22. *See also id.* at ¶¶ 24, 26, 32, 35, 37, 40, 49-50, 53-54. For example, every Class member subjected to either of the COI increases

[7] *Cf. Freeman Invs., L.P. v. Pac. Life Ins. Co.*, ---F.3d---, 2013 WL 11884, at *3 (9th Cir. Jan. 2, 2013) (reversing dismissal of class complaint against insurer who raised COI rates because plaintiffs' breach of contract claim "will turn on whether they can convince the court or jury that theirs is the accepted meaning in the industry" and not whether insurer made individual misrepresentations to each insured).

can establish a breach of contract by proving one common contention: that Phoenix did not implement the COI increase based upon any of the enumerated factors provided for in the policies that would permit an increase. *Id.* at ¶¶ 22-23. And, whether Phoenix's decision is justified by one of the contractually enumerated factors can also easily be determined through standard actuarial analysis common in the industry and simply reviewing the "experience studies", or lack thereof, that Phoenix conducted. *Id.* at ¶36. In fact, Mr. Stern's initial review of the data that Phoenix has produced to date suggests that none of these factors supported either COI increase. *Id.* at ¶37.

For example, if Phoenix raised COI rates due to policyholders' funding ratios [redacted] that act by Phoenix would breach *every* Class member's policy because no policy form allowed "funding ratio" as a grounds to increase the COI. "The mere fact that defendants may have engaged in any of the alleged practices alone would be enough to raise common questions of law." *Madanat*, 282 F.R.D. at 311.

Whether Phoenix's uniform actions are supported by the terms of the policy forms will therefore not vary on a policy-by-policy basis, and Phoenix itself never tried to argue to the NYSID that the legitimacy of its COI increases depended on issues unique to any individual contract. As Phoenix admitted to the NYSID: [redacted] Phoenix has not suggested the second COI increase applied to the 05PAUL NY policies was any different. *See* Ex. G (2/8/2011 Letter from Phoenix to NYSID, at PLIC 000946, 951).

The case for class certification here is therefore even *stronger* than either of the COI *Conseco* cases (which likewise certified classes), because plaintiffs here seek only to represent Class members who own policies issued in New York, and subject to New York law. And, unlike in *Conseco II*, where the plaintiffs had originally suggested that oral representations by the defendant at the point-of-sale may be relevant, the plaintiffs here rely entirely on the written language of these policies, which Phoenix itself has argued to the NYSID should be interpreted the same way across all policies. *See Conseco II*, 270 F.R.D. at 530.

As in *Steinberg*, because Class members possessed standard form contracts and Phoenix engaged in a common course of conduct against those class members, whether Phoenix's COI increase violated these standard policies will not depend on an individualized inquiry into the contractual terms or circumstances of each affected policy. 224 F.R.D. at 74. The key factual questions in the case involve the methodology, actuarial evidence, and reasoning behind Phoenix's COI rate increases, and whether Phoenix had any basis for targeting the policies affected by the COI increases as compared to other policies that were not affected by the increases. Resolution of these questions, which are central to every Class member's claim, requires no individualized determinations. Indeed, Phoenix itself must agree that the rate increases were made on a class-wide basis, because both the terms of the policies and New York insurance law prohibit a life insurer from increasing rates in a manner that discriminates within a class of insureds. N.Y. Ins. Law § 4224(a); *see Dornberger v. Metropolitan Life Ins. Co.*, 961 F. Supp. 506, 547–48 (S.D.N.Y. 1997).

In sum, the central issue in dispute is whether Phoenix's class-wide increase of the COI was contractually permitted under the standard, form contracts it entered into with each Class member. There are no unique facts relevant to this dispute for each Class member and Phoenix does not have different defenses to justify why some individual Class members were subjected to the COI increases—and in fact, Phoenix told New York's insurance regulator the same thing.

Thus, there are common answers to common questions, and commonality is therefore easily satisfied.

3. Typicality.

The typicality requirement is met when the claims of the class representatives "'arise from the same practice or course of conduct that gives rise to the claims of the proposed class members.'" *Jermyn v. Best Buy*, 256 F.R.D. 418, 436–37 (S.D.N.Y. 2009) (McMahon, J.) (quoting *Marisol A.*, 126 F.3d at 376); *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact pattern underlying the individual claims."); *Marisol A.*, 126 F.3d at 376 (typicality "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."). In this case, the class representatives complain of the same unlawful conduct as every other member of the class, in that all were subjected to a COI increase in violation of the terms of their policies. The plaintiffs will therefore make similar legal arguments to prove Phoenix's liability as any other Class member – breach of a form contract. The typicality requirement is met here even more clearly than it was in the cases cited above, because plaintiffs do not merely allege an unlawful "practice or course of conduct." Plaintiffs allege that all members of each class have been damaged by a single act by Phoenix, the decision to raise the COI. Any minor deviations in the numerical amounts of the specific policies at issue has "no bearing" on the contractual question common to all policies. *Madanat*, 282 F.R.D. at 313.

4. Adequacy of Representation.

The class representatives and their counsel are ready, willing, and able to fairly protect the interests of the class as a whole, and will devote the resources to pursue this case vigorously.

In determining whether the adequacy requirement is satisfied, the Court must consider whether "'1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.'" *In re Flag Telecom Holdings, Ltd. Securities Litigation*, 574 F.3d 29, 35 (2d Cir. 2009) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)). These criteria are easily met here.

The named plaintiffs are more than adequately able to represent the class. Both Martin Fleisher and Jonathan Berck are willing to represent vigorously the class and affirmatively understand their duties as class representatives. Fleisher Decl., ¶¶ 6-8; Berck Decl., ¶¶ 7-9. The named Plaintiffs have an adequate understanding of the claims being advanced in the litigation, reviewed the Complaint before it was filed, and are knowledgeable about the underlying actions taken by Phoenix. *Id.* Neither Fleisher nor Berck has any conflicts of interests with other members of the Class and no potential interests that are antagonistic to the Class that would preclude them from representing the Class as a whole. *Id.* Both are trustees of trusts that own policies issued by Phoenix and are in the same position as all other policyholders in the proposed Classes, all of whom have a common interest in seeing that the terms of their policies are honored. *Id.*

Plaintiffs' counsel has extensive experience as counsel of record in certified class actions, and has specific expertise in litigation over life insurance policies, having handled a number of cases in this area. *See* Sklaver Decl., ¶¶ 1-2, Ex. A. Lead counsel for Plaintiffs, Steven G. Sklaver, has also previously represented other named plaintiffs in a certified class action in which his law firm, Susman Godfrey L.L.P., was appointed lead counsel. *Id.* at ¶2. Counsel for

Plaintiffs is more than capable of representing the interest of the proposed Classes in this case. *See also* Ex. T, Hr'g Tr. at 13 (The Court: "[The] adequacy of representation is assumed").

C. The Proposed Classes Satisfy the Requirements of Rule 23(b)(3)

Certification of each of the proposed Classes is appropriate under Rule 23(b)(3), because the common issues of law and fact predominate over individual issues, and because a class action is the superior method for adjudicating this controversy.

1. Predominance.

The predominance requirement of Rule 23(b)(3) is satisfied when "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, ... predominate over those issues that are subject only to individualized proof." *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010) (quoting *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107–08 (2d Cir. 2007)) (ellipsis in original). While the predominance standard is more demanding than the commonality required by Rule 23(a), predominance "does not require a plaintiff to show that there are *no* individual issues." *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 111 (S.D.N.Y. 2011) (emphasis in original).

There is widespread agreement that certification under Rule 23(b)(3) is warranted for claims that involve contracts that, like here, contain the same or essentially the same terms. "An overwhelming number of courts have held that claims arising out of form contracts are particularly appropriate for class action." *Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 37 (E.D.N.Y. 2008); *see, e.g.*, *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 42 (1st Cir. 2003) ("Overall, we find that common issues of law and fact predominate here. The case turns on interpretation of the form contract, executed by all class members and defendant."); *Seekamp v. It's Huge, Inc.*, No. 1:09-CV-00018, 2012 WL 860364, at *11 (N.D.N.Y. Mar. 13, 2012) (certifying class in claim for breach of "a standard form contract, the interpretation of which will not require individualized inquiries as to each contract signed by each proposed class member"); *Steinberg*, 224 F.R.D. at 76 (predominance requirement satisfied when "the plaintiff's claim is for the simple breach of a standard form contract and involves only the standard rules of contract interpretation").

Because this is a breach of contract case arising out of standardized insurance policy forms, the common questions of law and fact predominate over any individual questions. The insurance policies at issue contain provisions regarding how COI rates are set and what Phoenix can consider in making any changes in rates, and these terms are substantively identical for all the policies held by the members of the Classes. Even if the appropriate interpretation of these terms is disputed, that issue will be resolved when this court decides "the accepted meaning in the industry" of the same provisions in these uniform policies, not on how any one individual insured may have interpreted his or her contract. *Freeman*, 2013 WL 11884, at *2. The key issue regarding these two Classes is whether Phoenix increased the COI in a way or in a manner that violated the terms of the form insurance contracts. Resolution of those questions—and thus Phoenix's liability—will depend on common proof. *See Flores*, 284 F.R.D. at 130-31 ("The key issue regarding this class is whether Defendants had general policies to deny its employees spread of hours pay and to make its employees pay for their uniforms. Plaintiffs have adduced sufficient evidence that these common policies exist. Resolution of these questions—and thus Defendants' liability—will depend on common proof.").

The lawfulness of Phoenix's actions as to each member of the Classes will not depend on issues specific to that individual, but will instead depend on the common answer to the common contention that Phoenix used an impermissible basis to increase the COI for a large group of policyholders in one fell swoop. *See* Stern Decl. ¶¶ 22, 24, 26, 32, 40, 49-54. Phoenix's own response to the NYSID's inquiries about the first COI increase confirms that these policies are standard form contracts, the language of which can be interpreted once and applied to all. *See* Ex. G (2/8/2011 Letter from Phoenix to NYSID, at PLIC 000940, 946 n.9, 951) [redacted] Therefore, the predominant questions in the case are "subject to generalized proof, and thus applicable to the class as a whole." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F. 3d 124, 136 (2d Cir. 2001).

The case for class certification is especially strong when, as here, the alleged breach involves a single decision by Phoenix to take action with respect to all class members. When a defendant makes a class-wide decision, the proof of whether the decision was lawful will be based on evidence that applies equally to the Class as a whole. For example, in *Board of Trustees of the AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, the court certified a Rule 23(b)(3) class of account holders suing a bank for breach of fiduciary duty for deciding to purchase a particular security for their accounts. 269 F.R.D. 340 (S.D.N.Y. 2010). In holding that the plaintiff satisfied the predominance requirement, the court emphasized that the defendant bank made the decision "on behalf of *all* class members," and that its treatment of and communication with all class members was the same. *Id.* at 349–50 (emphasis in original); *see also Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003) ("Because all of the dealer agreements were materially similar and [defendant] purported to reduce the price of wholesale gas for all dealers, … [w]hether it breached that obligation was a question common to the class and the issue of liability was appropriately determined on a class-wide basis."); *In re Risk Mgmt. Alts.*, 208 F.R.D. at 505 (predominance requirement satisfied for FDCPA suit when claims of all class members were based on same language communicated by defendant to each class member). With each rate hike, Phoenix illegally changed the formula for raising COI applicable to the entire Class, and the predominance requirement is easily satisfied.

As compared to the common issues that are central to this case, there are few individual questions that will require significant additional proof. By definition, all class members are policyholders who received notice that they were being subjected to an increase in their cost of insurance from Phoenix. Compl. ¶¶ 36-37 (defining classes). These policyholders can be easily identified from Phoenix's records. Through its notice to the Class members, Phoenix itself asserted its contractual right to payment from them, so there can be no reasonable dispute about the existence of a contractual relationship between Phoenix and each Class member. Further, the breach of contract claims do not depend on oral communications between Phoenix and any individual policyholder, but depend on the written terms of the policies and Phoenix's class-wide decision to adjust rates. *See Conseco II*, 270 F.R.D. at 530 (certifying class in part because "as long as plaintiffs are willing to attempt to prove their claims based solely on the policy documents, and not on any oral representations made by sales agents, the Court does not believe that a significant amount of individualized proof will be required); *cf. Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1253 (2d Cir. 2002) (noting that class certification for fraud claim is warranted when all class members received "standardized" communications, but not when there are "material variations" in the defendant's communications with each class member).

Finally, the damages suffered by each plaintiff can be readily ascertained. Although not every plaintiff has suffered the same amount of damages, the damages vary primarily based on the size of each affected policy and the amount of additional payment Phoenix demanded from each policyholder. Most if not all of the evidence needed to determine damages can be obtained from Phoenix's own records of each policyholder's cost of insurance and accumulated policy value over time.

Even if some individualized fact-finding to determine damages is necessary, this would not be a sufficient reason to defeat class certification. "[I]t is well-established that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification." *Seijas v. Republic of Arg.*, 606 F.3d 53, 58 (2d Cir. 2010); *Flores*, 284 F.R.D. at 126-27 ("The differences among the Plaintiffs as to the number of hours worked, the precise work they did, and the amount of pay they received concern the amount of damages to which any individual Plaintiff might be entitled if and when liability is found, not the amenability of the plaintiffs' claims to the class action form." (quotation marks and citations omitted)).

2. Superiority.

This action provides a single forum to adjudicate the rights of over one-hundred policyholders regarding the same issues, and thus affords an efficient resolution of this controversy. Rule 23(b)(3) lists four factors in determining whether a class action is a superior method of adjudication: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). These factors unambiguously favor certification of the proposed classes.

First, the class members have no substantial interest in proceeding individually rather than collectively. All class members share an interest in having their contractual rights protected, and the classes therefore have a "high degree of cohesion." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Adv. Comm. Notes to Rule 23). But because there are complex factual and legal issues surrounding an insurance company's methodology for changing rates, many of which requires expert testimony, few if any class members could afford on their own to seek legal redress for Phoenix's actions, especially against a defendant with such extensive resources to litigate. While the aggregate effect of Phoenix's misconduct is large, the individual claims are relatively small and do not provide a sufficient incentive for plaintiffs to bring individual claims.

Even if some of the policyholders' damages are large enough to provide an incentive for some class members to sue on their own, this would be no bar to class certification. "[T]he existence of large individual claims that are sufficient for individual suits is no bar to a class when the advantages of unitary adjudication exist to determine the defendant's liability." *Board of Trustees of the AFTRA Ret. Fund*, 269 F.R.D. at 355 (quoting 2 Newberg on Class Actions, § 4.29 at 260 (4th ed. 2010)); *see also Amchem Prods. Inc.*, 521 U.S. at 617 (noting "Rule 23(b)(3) does not exclude from certification cases in which individual damages run high" and that Rule 23's "opt out" provision for (b)(3) classes provides protection for class members who desire to control their own actions); *Pub. Emps.*, 277 F.R.D. at 120 (certifying class that included institutional investors with large claims and noting that even if some class members would have the incentive to sue individually, "proceeding as a class would still be superior to over 1,600 individual actions").

As for the second factor, Plaintiffs are aware of only three other parties who have brought claims challenging Phoenix's COI increases, *Tiger Capital, LLC v. PHL Variable Insurance Co.*, No. 12 Civ. 2939 (S.D.N.Y.), *U.S. Bank National Association, as securities intermediary for Lima Acquisition LP v. PHL Variable Insurance Co.*, No. 12 Civ. 6811 (S.D.N.Y.), and *PHL Variable Ins. Co. v. The Helene Small Ins. Trust*, No. 1:12-CV-00312 (D. Del.), and *none* of those cases is against the same defendant here, Phoenix Life Insurance Company.[8] That fact further supports class certification. *Pub. Emps.*, 277 F.R.D. at 121 ("[T]he fact that only two investors out of 1,600 have filed independent actions weights in favor of class certification.").

The third and fourth factors further bolster the case for class certification. It is desirable to concentrate this litigation in a single forum, which "plainly has a number of benefits, including eliminating the risk of inconsistent adjudications and promoting the fair and efficient use of the judicial system." *Id.* at 121 (quoting *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 CV 8144, 2009 WL 5178456, at *12 (S.D.N.Y. Dec. 23, 2009)). It would be a waste of resources for the parties and the judicial system if each plaintiff were required to institute an individual action to simultaneously determine whether Phoenix's COI rate increases were lawful, especially given that the critical evidence about the basis for Phoenix's conduct would be identical in each case. *Jermyn*, 256 F.R.D. at 436–37 ("From the standpoint of judicial economy, the only rational way to proceed is to concentrate the class' claims in a single action, rather than have numerous separate trials on the same issue, based on the same evidence.").

There are no inherent difficulties to the maintenance of this case as a class action, and in fact this case will be far more manageable than many class actions that are regularly certified. Unlike many consumer class actions, for example, the identity of each class member is readily ascertainable, based on Phoenix's own records of who was subjected to the rate increases. All members can be readily notified that a class has been certified. Further, the case can be managed efficiently in this forum. As already discussed, the common questions predominate and only

[8]The general partner of Lima Acquisition PLC not only has a case pending in the SDNY, but also brought suit against PHL Variable Insurance Company and Phoenix Life Insurance Company and others that reference COI increases, but only alleges antitrust claims, RICO claims, and claims under the Connecticut Unfair Trade Practices Act. *See Lima LS PLC v. PHL Variable Ins. Co., et al.*, 3:12-cv-01122 (D. Conn).

minimal individualized determinations, if any, will be necessary. Discovery in this matter is well under way and certification of a class will undoubtedly further the fair and efficient resolution of this controversy.

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court certify the two classes defined in the Complaint, which alleges a single cause of action for breach of contract.

Dated: January 11, 2013

Steven G. Sklaver

Seth Ard
SUSMAN GODFREY LLP
560 Lexington Avenue, 15th Floor
New York, NY 10022
Tel.: 212-336-8330
Fax: 212-336-8340
sard@susmangodfrey.com

Steven G. Sklaver (*pro hac vice*)
Frances Lewis
SUSMAN GODFREY LLP
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
Tel: 310-789-3100
Fax: 310-789-3150
ssklaver@susmangodfrey.com
flewis@susmangodfrey.com

Attorneys for Plaintiffs